It has, then, been determined—and if by error, then by error so widespread as to begin to constitute minority opinion—that change in the court's mind, change in a higher conflicting law, change in an objectionable companion law, may operate, without re-enactment, to breathe life into a statute once adjudged unconstitutional. In each case the reason was: that the change had removed the only bar. So here, where the only bar is found in the surrounding facts, the cost of gas producing. Why, with a statute made for the fixing of rates, a statute "of continuing operation," a statute whose only flaw is non-conformance with the facts of the moment, may not a change in those facts to-morrow remove unconstitutionality?

Whether such a development as this is desirable is another question, and, it may be, a debatable one. Are we, with every economic change, to find our laws uncertain—on every revision of a constitution, are we to examine ancient records to search out forgotten statutes whose ghosts if this or that clause is repealed, will start forth to haunt the halls of Justice? We have had undesirable experiences at times with the repealing of repealing acts.

But, on the other hand, this dreaded resurrection of forgotten statutes may prove to be more bugaboo than menace. We have our jurisdictions where non-user of a statute is held to be without effect. Unrepealed by the legislature, it still stands on the books: why, then, it is in force. Faded out from all men's memory, sanded over with the drift of years—but still in force. Let some adventurous treasure-seeker strike upon it in his excavations, let him set it up—the courts will recognize it still as law. Surely in such jurisdictions, if at all, the evils to be feared from the unearthing of forgotten statutes would be found and cried out upon. Yet even there we hear but rare complaints. There seem, in practice, to have been but few legal archeologists at work a-troubling the unwary lawyers of the younger generation. It may be that, in the large, only the rather useful statutes are, under such a rule, called back to life.

SOME RECENT DECISIONS OF THE UNITED STATES SUPREME COURT

Panama Railroad v. Bosse (March 3, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 203, is an extraordinarily interesting case dealing with the reception of the common law in the Canal Zone. The opinion, written by Mr. Justice Holmes, furnishes an excellent example of the application of the prevailing *mores* of a community to the settlement of legal disputes. The precise point raised was whether the common-law doctrine of the responsibility of a master for the torts of his servant committed within the scope of his employment could be applied in its full extent to accidents happening in the Zone. Theoretically the provisions of the Civil Code of the Republic of Panama are in

force there. It was argued that this code as construed in civil law countries would not cover the case in hand. The Supreme Court of the Zone had held as early as 1910 that it would look to the common law in the construction of such Colombia statutes as were still in force there;[1] it had also held that, at least so far as railroads were concerned, the common-law liability of master for servant would be applied.[2] The District Court of the Zone accordingly allowed recovery in the principal case. In affirming a decision of the Circuit Court of Appeals upholding this, Mr. Justice Holmes argued that the common-law rule in question was familiar to all the present inhabitants of the Zone—who are chiefly employees of the Canal, the Panama Railroad Company, etc.—and that therefore it ought to be applied unless it were necessarily inconsistent with the provisions of the Civil Code, even if it were to be conceded that the latter would have been construed differently by a court in a civil law jurisdiction. The result is both sensible and sound.

The Harrison Narcotic Drug Act[3] purports on its face to be a revenue law, but as is well known, its chief object is to prevent the abuse of narcotic drugs. Under its provisions sales of the drugs in question are confined to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. The constitutionality of the law has recently been upheld by the United States Supreme Court in *United States of America v. Doremus* (March 3, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 367.[4] The Chief Justice and Justices McKenna, VanDevanter and McReynolds dissented. The majority took the view that it was not possible for the court to say that the provisions regulating the sales of these drugs in the manner specified had no reference to the collection of revenue, as they did "tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue," as well as to "diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law." The decision is an illustration of the fact which Chief Justice Marshall pointed out in *McCullough v. Maryland*,[5] that the power to tax is the power to destroy.

It is usually the employers who attack workmen's compensation laws

[1] *Kung Ching Chong v. Wing Chang* (1910) 2 Canal Zone Sup. Ct. Rep. 25, 30.
[2] *Fitzpatrick v. Panama Railroad Co.* (1913) 2 Canal Zone Sup. Ct. Rep. 111, 121, 128.
[3] 38 St. at L. 785, 6 U. S. Comp. St. 1916, sec. 6287g.
[4] Also in *Webb et al. v. The United States* (March 3, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 370.
[5] (1819) 4 Wheat. 316.

as unconstitutional. In *Middleton v. Texas Power & Light Co.* (March 3, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 102, it was the employee who was the complaining party. Under the Texas law which was attacked an employer may elect whether he will come under the Compensation Act or not. If he so elects, all his employees are *ipso facto* under the act; they cannot work for him and claim damages on common-law principles. The argument of the employee was that the effect of this was to deprive him of the "equal protection of the laws" as well as of "liberty and property" without due process of law. In an unanimous opinion the Supreme Court negatived all these contentions, on the ground that the employee was at liberty to refuse to work for employers who had accepted the act and thus had his election. In sustaining the reasonableness of the resulting limitation upon the employee's election, the Court called attention to the relative mobility of labor as compared with that of capital, and emphasized the desirability of a uniform rule applicable to all the employees of a given employer so that he may provide the necessary liability insurance.

A railroad company obtains first a temporary and then a permanent injunction restraining a state railroad commission from putting into effect a schedule of rates adopted by the commission, on the ground that the rates are so low as to be confiscatory. When the final decree is entered the bond given at the time of the granting of the temporary injunction is released and the sureties thereon are discharged from liability. Over two years later the decree of the lower court is reversed by the appellate court, with directions to dismiss the bill without prejudice, and the lower court is commanded to take such further proceedings as may be "according to right and justice and the laws of the United States." Under such a mandate may the lower court permit shippers, consignees, and other persons similarly situated, to intervene and claim a refund of the difference paid by them between the rates prescribed by the commission and those kept in force by the railroad company? This question is answered in the affirmative in the recent case of *Arkadelphia Milling Co. v. St. Louis & Southwestern Ry.* (March 3, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 92. No case precisely in point is cited by the Court. The decision is based upon "the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." To the argument that the persons thus permitted to intervene are not in a position to invoke this principle of restitution because they were not parties to the original proceedings, the Court replied that "the point is unsubstantial," as

the railroad commission in defending the rate schedules against attack represented all shippers.[6]

An important question arising under the copyright statutes of the United States was involved in *L. A. Westermann Co. v. The Dispatch Printing Co.* (March 3, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 50. The plaintiff had separately copyrighted illustrations of styles of women's apparel and had granted to various dealers exclusive licenses to use the same within restricted areas. In advertisements inserted for dealers who were not authorized to use the illustrations, the defendant printed in its daily newspaper five of the copyrighted illustrations once, and one of them twice—the latter for two different advertisers. The questions raised were, whether there were seven distinct cases of infringement or not, and, if so, what damages should be assessed, where no particular amount was shown and the testimony established the fact that it was not possible to make any real estimate of them. The District Court held that there were seven cases of infringement, but awarded only nominal damages of $10 for each. The Circuit Court of Appeals held that there was only one case of infringement, but that, properly interpreted, the statute entitled the plaintiff to $250 damages. The Supreme Court took the view of the District Court that there were seven cases of infringement, but agreed with the Circuit Court that the plaintiff was entitled to $250 for each infringement. The result hinged entirely upon the construction to be given to the somewhat ambiguous wording of the statutes in question.

When reading decisions interpreting that clause of the Federal Constitution which guarantees to citizens of one state all the privileges and immunities of citizens in the other states, one sometimes wonders what those who framed the clause in question would say of the result. The recent case of *LaTourette v. McMaster* (1919) 39 Sup. Ct. 160, is one which raises doubts whether this particular clause of the Constitution is accomplishing its purpose. A statute of South Carolina requires all insurance brokers to take out a license, and limits the granting of licenses to residents of the state. Under the Fourteenth Amendment all American citizens are also citizens of the state in which they reside. Although the result of the South Carolina statute therefore is to prevent all citizens of other states from transacting the business in question in South Carolina, the Supreme Court of the United States in the case cited held the statute constitutional, on the ground that it also

[6] *Cf.* (1919) 28 YALE LAW JOURNAL, 505, for another angle of the problem here involved.

excludes foreigners who reside in other states, and, on the other hand, allows foreigners residing in South Carolina to engage in the business. The discrimination, therefore, is not based upon citizenship but upon residence. The result is probably consistent with other decisions interpreting the same clause, but one cannot help wishing that such discriminations against citizens of other states were impossible under our constitution. State boundary lines are, after all, imaginary lines. Perhaps the lack of any method of interstate service of judicial process may be the reason why such statutes are passed and upheld. However this may be, Americans may profitably compare the ambiguity of our constitution upon this point with the clarity of the corresponding provision in the fundamental law of Australia. The latter reads as follows: "Sec. 117. A subject of the King, resident in any State, shall not be subject in another State, to any disability or discrimination which would not be equally applicable to him if he were a subject of the King resident in such other State." Under such a provision the South Carolina law would, as applied to citizens of other states, clearly be unconstitutional. Australia, however, has also an adequate system of interstate service of process, so that the resident of another state may be sued in the state in which he entered into the transaction in question.[7]

[7] See (1919) 28 YALE LAW JOURNAL, 441.